In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 649

LOCAL 174 and JOINT COUNCIL No. 28 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GEORGE CAVANO and JIMMY MARTIN,
Petitioners,

vs.

DELL L. SELLES, *Respondent*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners pray that a rehearing be granted of the order of the Court, dated June 2, 1958, denying the petition for writ of certiorari filed in the above entitled case.

Although the order denying the petition did not state the reasons therefor, we assume that the Court acted upon a belief that the matters set forth in the petition were concluded by the decisions rendered a week earlier in *International Association of Machinists, et al., v. Gonzales,* ..... U.S. ....., 78 S.Ct. 923 (May 26, 1958) and *International Union United Automobile Workers, et al., v. Russell,* ..... U.S. ....., 78 S.Ct. 932 (May 26, 1958). We may have unwittingly contributed to the Court's action, in this respect, by arguing in our petition that the question involved in this case is the

same question as that involved in the *Gonzales* case.[1] While the abstract questions of law, as stated in the petitions, appear to be identical, the factual situations and the legal theories applied by the trial courts in each case are different. Similarly, the instant case differs from the *Russell case*. We respectfully submit this petition for rehearing in the hope that the Court will give consideration to the distinctions that exist between the cases.

It is our contention that, in view of these distinctions, the rationale applied in *Gonzales* and *Russell* does not dispose of the federal pre-emption issue raised by this case.

It is also our contention that irrespective of the controlling effects of *Gonzales* and *Russell*, the petition in this case should be granted in order to avoid further uncertainty and misunderstanding in an already complex field of law.

1. The decision of the Court in *International Association of Machinists, et al., v. Gonzales* does not dispose of the federal pre-emption issue raised by this case.

In *International Association of Machinists, et al., v. Gonzales*, ... U.S. ....., 78 S.Ct. 923 (May 26, 1958), the respondent, Marco Gonzales, was expelled from his local union, and its parent international organization, in violation of his rights under the unions' constitution and by-laws. Following his expulsion, the union refused to dispatch Gonzales from the union hiring

[1] The petition in *Gonzales* was granted January 14, 1957, 352 U.S. 966. The petition in this case was filed December 7, 1957, while *Gonzales* was still pending.

hall and he was unable to obtain work at his trade. Gonzales then brought an action against the unions in a California state court and successfully recovered a judgment ordering the unions to reinstate him to membership and awarding him damages for lost wages and for mental and physical suffering. The theory upon which he recovered was that the unions' constitution and by-laws constituted a "contract" between the members and the unions and that this "contract" was breached by his wrongful expulsion. The unions appealed the judgment through the California courts and brought the matter here by way of a petition for certiorari, arguing that the California court lacked jurisdiction to adjudicate Gonzales' cause of action, other than his request for reinstatement in the union, as the subject matter of his action was pre-empted by the provisions of the federal Taft-Hartley Act. For reasons hereafter stated, this Court rejected the unions' argument and affirmed the exercise of jurisdiction by the California court.

In the instant case, the respondent (Selles), like Gonzales, was denied the services of his union hiring hall (this action having been taken against Selles in retaliation for his participation in an intra-union reform movement). In contrast to the situation in *Gonzales*, however, Selles was not expelled from union membership. He was, and still is, a member in good standing in his union.

In bringing suit against the union in a Washington state court, Selles did not rely, as did Gonzales, on a theory that his rights as a member had been interferred

with, or that, by its conduct, the union had "breached" the terms of the unions' constitution. Selles' theory of recovery was that the union had interferred with his rights as an employee (i.e., by refusing to dispatch him from the hiring hall, as a result of his participation in the intra-union reform movement, the union had wrongfully interferred with his employment). Unlike Gonzales, Selles did not seek reinstatement in the union, or an award of damages for mental and physical suffering. He sought and obtained an award of damages solely in compensation for his loss of wages.[2]

In holding that Gonzales' state court breach of contract suit was not barred by the provisions of the Taft-Hartley Act this Court noted that the Act was not designed to protect "union members in their rights as members from arbitrary conduct by unions and union officers." *Ibid*, 78 S.Ct. 923, 925. Persuasive here was the language of the proviso to Section 8(b)(1) of the Act, stating that said section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . "

In the opinion of this Court, the California litigation involved precisely the matter placed beyond the scope of the federal Act by this proviso, that is, a determination of whether the unions properly applied their own "rules" for the "retention of union membership," in their expulsion of Gonzales. As the Court indicated later in its decision:

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[2]For a complete statement of the case, with page references to the record, see our Petition, pp. 2-8.

> " . . . the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under Sec. 8(b) (2)." *Ibid*, 78 S.Ct. 923, 926.

In answer to the unions' argument that the National Labor Relations Board has the authority to afford a remedy to Gonzales by way of a back pay award for the wages he lost as a result of the unions' refusal to dispatch him from the hiring hall, this Court held that such relief would be only a "partial remedy" compared to the "comprehensive relief of equity" to which Gonzales was entitled under California law. There exists no conflict of remedies, such as to necessitate the application of the federal pre-emption doctrine, because "The National Labor Relations Board could not have given Gonzales the relief that California gave him according to its local law of damages." An award of back pay from the Board would not have included damages for "mental or physical suffering." *Ibid*, 78 S.Ct. 923, 925.

The rationale applied in *Gonzales* does not fit the facts of the instant case.

As we have noted earlier, Selles state court action was based, not on his rights as a member of the union, or upon an alleged "breach" by the union of its constitution or by-laws, but *upon his rights as an employee*. He

sought and recovered a judgment on the theory that the union's refusal to dispatch him to available jobs, in retaliation for his participation in an intra-union reform movement, was *an unlawful interference with his employment.*

The protection of an employee's job against interference by a union is a matter of which the Taft-Hartley Act has expressly taken hold. As this Court emphasized in *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954), "The policy of the Act is to insulate employees' jobs from their organizational rights."[3]

Even the court below had to acknowledge that the subject matter of Selles' state court litigation fell within the scope of the federal Act. The court below found that the union's refusal to dispatch Selles to available jobs, in retaliation for his intra-union activities, is a violation of Sections 8(b)(1)(A) and 8(b)(2) of the Act, and concluded "the facts reasonably bring the controversy within the purview of the Act" (See Petition, App. A, p. 19).

It is also significant that Selles himself went to the National Labor Relations Board and filed unfair labor practice charges concerning this matter. After due investigation, the Board formally issued a complaint, but before a hearing could be held, Selles withdrew his charges, and the Board then withdrew its complaint.

[3]This Court, in *Radio Officers*, ruled that the Act permits only one limited method by which a union can interfere with an employee's job —pursuant to a legitimate union security agreement, the union can demand the discharge of an employee who fails to tender the "periodic dues and initiation fees uniformly required"—al' other forms of interference with employment rights are forbidden.

In summary, the exercise of state jurisdiction in this case cannot be affirmed, as it could in *Gonzales*, on the theory that the action involves only the "relations between the respondent and his unions," a matter which "has not been undertaken by federal law." The litigation in the instant case involves a union's interference with the job rights of an employee—a subject matter expressly undertaken by the federal Act.

Furthermore, this case cannot be decided, as could *Gonzales*, on the ground that there is no serious conflict of remedies present because a National Labor Relations Board award of back pay is only a "partial remedy" compared to what respondent received under state law. In this case, Selles sought and received an award of damages in compensation for his loss of wages only—an identical remedy to that which the Board is empowered to order.

An award of back pay by the Board is designed to accomplish the same result as the award of damages made in this case, that is, to make the employee whole for his loss of wages. Where the Board finds that a union has unlawfully caused an employee to suffer a loss of employment, the Board follows the practice of ordering the union:

> " . . . to make (the employee) whole, as closely as possible, for any loss of pay or other incidents of the employment relationship (he) may have suffered by reason of the (union's) unlawful conduct." *Pen & Pencil Workers Union, Local 19593*, 91 NLRB No. 155 (1950).

We respectfully submit, therefore, that the reason-

ing applied by this Court in deciding *Gonzales* does not apply to the instant case.

2. The decision of this Court in *International Union United Automobile Works, et al., v. Russell* does not dispose of the federal pre-emption issue raised by this case.

Just as the instant case differs significantly from *Gonzales*, so also does it differ from *International Union United Automobile Workers, et al., v. Russell*, ... U.S. ....., 78 S.Ct. 932 (May 26, 1958).

The *Russell* case involved an employee who was prevented from going to work by a union's mass picket line, which was enmeshed with acts of violence and threats of violence. Russell sued the union in an Alabama state court for unlawfully interfering with his employment and recovered a judgment of $10,000, approximately $500 of which represented compensation for loss of wages, and the other $9,500 represented punitive damages (*Ibid*, 78 S.Ct. 932, 934-935, 942 n. 10). For reasons hereafter stated this court affirmed the exercise of jurisdiction by the Alabama court.

Although the state court action in *Russell* was brought, like the instant case, upon the theory that the union had tortiously interfered with Russell's employment, the case was based on a fact situation involving violent conduct, quite unlike the instant case. This, we believe, gave the case a posture conducive to the exercise of state jurisdiction, for previous decisions of this court, cited in *Russell*, had firmly established that the Taft-Hartley Act was not intended by Congress to im-

pair a state's traditional power to deal with violent conduct.

The union argued, in *Russell*, that the union's mass picket line would constitute an unfair labor practice under the federal Act, and that the National Labor Relations Board is empowered, in such a case, to award back pay to those employees who were prevented from working by the mass picket line. This Court recognized no conflict of remedies in such a situation. The Court reasoned, as it did in *Gonzales*, that although the federal Board is empowered to award back pay, this would be only a "partial remedy" compared to the relief granted the respondent in the state court. The Court pointed out that the State of Alabama allowed Russell to recover punitive damages, whereas this form of relief is not permitted under the federal Act. (*Ibid*, 78 S.Ct. 932, 939).

As we explained earlier, in our discussion of the *Gonzales* decision, this "partial relief" theory does not apply in the instant case. The relief recovered by Selles in the Washington state court is no greater or no different than the relief available to him through the National Labor Relations Board. Selles recovered solely for loss of earnings. No punitive or exemplary damages were allowed.[4]

We contend, for the foregoing reasons, that the reasoning applied by this Court in deciding *Russell* does not apply to the instant case.

[4] In the absence of a statute, punitive or exemplary damages are not recognized in the State of Washington. *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 286, 173 P.2d 652 (1946); *Essig v. Keating*, 158 Wash. 443, 444, 291 Pac. 323 (1930).

3. Conclusion.

For the reasons stated heretofore, we believe that the *Gonzales* and *Russell* decisions do not dispose of the federal pre-emption issue raised in this case. As we had previously emphasized in our petition, the judgment of the court below has permitted a state court action to be brought to bear on union conduct which falls within the terms of the federal Act, and it has allowed a state court remedy for that conduct which is substantially identical with the remedy available through the National Labor Relations Board. Under the federal pre-emption decisions of this Court, the judgment below is clearly erroneous.

If, however, we have misread the *Gonzales* and *Russell* decisions and if, contrary to our contentions, they justify the judgment entered by the court below, we respectfully submit that it would be extremely desirable for this court to grant the petition and affirm that judgment. The denial of our petition, without comment or citation of authority, will only tend to create further uncertainty and misunderstanding in an already complex field of law. On the other hand, a decision in this case on the merits will serve as an important guidepost for courts, attorneys, unions, employers, employees, and legislators, who are constantly confronted with the problem of determining the elusive boundaries between federal and state jurisdiction in labor relations matters.

We respectfully urge this court to grant a rehearing

of the order of June 2, 1958, denying the petition for writ of certiorari previously filed herein.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition for rehearing is filed for the purpose of bringing to the Court's attention substantial grounds for the granting of the petition for writ of certiorari, not previously presented. It is filed in good faith, and not for purposes of delay.

SAMUEL B. BASSETT
Attorney for Petitioners.

June 24, 1958.